

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 BRADLEY COOPER and TODD LABAK,
5 Individually and On Behalf of
6 All Others Similarly Situated,

7 Plaintiffs,

8 v.

9 THORATEC CORPORATION, GERHARD
10 F. BURBACH, TAYLOR C. HARRIS,
11 and DAVID V. SMITH,

12 Defendants.

Case No. 14-cv-00360-CW

ORDER REGARDING CLASS ACTION
SETTLEMENT DOCUMENTS

(Dkt. No. 122)

13 The Court heard Plaintiffs' motion for preliminary approval
14 of their class action settlement on March 5, 2018. Plaintiffs'
15 proposed notice of settlement states that the Court appointed
16 Plaintiff Todd Labak as class representative and makes no mention
17 of Lead Plaintiff Bradley Cooper. Plaintiffs' counsel
18 represented at the hearing that Labak is the sole class
19 representative. However, the Court appointed Cooper as Lead
20 Plaintiff on April 21, 2014, pursuant to the Private Securities
21 Litigation Reform Act, 15 U.S.C. § 78u-4(a)(3)(B), and Federal
22 Rule of Civil Procedure 23. See Docket Nos. 21, 11. Plaintiffs
23 subsequently filed a motion for class certification in which they
24 sought appointment of Labak as a class representative pursuant to
25 Federal Rule of Civil Procedure 23. The motion refers to Cooper
26 as "Lead Plaintiff" and does not seek to withdraw Cooper as Lead
27 Plaintiff. Docket No. 98 at ii. It does not appear that
28 Plaintiffs have otherwise sought to withdraw Cooper as Lead
Plaintiff, and the Court's order granting Plaintiffs' motion for

1 class certification states that "Labak and Cooper are adequate
2 class representatives." Docket No. 119 at 6. The Court ORDERS
3 Plaintiffs to file a supplemental brief that explains their
4 representation that Cooper is not a class representative and that
5 Labak is the sole class representative no later than two days
6 from the date of this order. If Plaintiffs determine that Cooper
7 remains a class representative, Plaintiffs should explain whether
8 they will seek to withdraw Cooper as a class representative and
9 confirming that they do not plan to request that the Court
10 approve an incentive award for Cooper.

11 As stated at the hearing, should this Court preliminarily
12 approve the class action settlement, Plaintiffs must provide with
13 their final approval documents information on the settlement
14 administrator selection process, how many settlement
15 administrators submitted proposals, what methods of notice and
16 claims payment were proposed, and the lead class counsel's firm's
17 history of engagements with the settlement administrator over the
18 last two years. See Procedural Guidance for Class Action
19 Settlements (updated Nov. 1, 2018 and Dec. 5, 2018) (Procedural
20 Guidance).

21 The Court ORDERS Defendants to file an affidavit or
22 declaration stating whether they provided notices to the
23 appropriate state and federal officials in compliance with the
24 Class Action Fairness Act, 28 U.S.C. § 1715, no later than two
25 days from the date of this order. If Defendants have not yet
26 provided such notices, Defendants must state when they intend to
27 provide these notices.

28 The Court ORDERS that the parties file their "side

1 agreement" described in the "Opt-out Termination Right,
2 Confidentiality" Section of the stipulation under seal no later
3 than two days from the date of this order. See Stip. of
4 Settlement at 27, Docket No. 122-1.

5 The Court ORDERS that the parties make the changes described
6 below to the settlement documents and file revised copies of the
7 enumerated documents no later than two days from the date of this
8 order.

9 The Court addresses each document requiring changes
10 separately below. However, the parties should revise the caption
11 in each settlement document to reflect this order's caption. The
12 parties should also replace each placeholder date in each
13 document that includes such a date with the relevant date
14 determined at the hearing.

15 A. Stipulation

16 The parties should revise this sentence, "Additional sums
17 for this purpose may be paid prior to the Effective Date from the
18 Escrow Account upon agreement of the Parties or order of the
19 Court," to state, "Additional sums for this purpose may be paid
20 prior to the Effective Date from the Escrow Account upon order of
21 the Court." Stip. of Settlement at 18.

22 The parties should state that any amount less than \$20 is
23 presumptively too costly to distribute to any class member, but
24 that Plaintiffs will seek Court approval before distributing any
25 remaining settlement funds to the cy pres recipient in any event.

26 B. Full-length Notice

27 Plaintiffs should omit the requirement that any objection
28 "be delivered" to class and defense counsel. Notice at 9, Docket

No. 122-2. Objections should be filed with the Court only. See Procedural Guidance. Plaintiffs should include in the notice that objections and supporting materials must clearly identify the case name and number, and that the Court can only approve or deny a settlement and cannot change the terms of the settlement. See id.

Plaintiffs should include instructions on how to access the case docket via PACER and inform class members to check the settlement website or PACER to confirm that the final approval hearing date has not changed. Plaintiffs should state that the settlement administrator will immediately post any changes to the final approval hearing date to the settlement website.

Plaintiffs should state that the class members will not be informed of a change in the final approval hearing date and that they must affirmatively seek this information by checking the settlement website or PACER.

Plaintiffs should state when they will upload the various settlement documents to the settlement website and activate it.

Plaintiffs should revise this clause, "(c) the materiality [sic] any allegedly false and misleading statements," to state, "(c) the materiality of any allegedly false and misleading statements." Notice at 2.

Plaintiffs should revise this sentence, "These negotiations resulted in the agreement to settle all claims of the Class against the Defendants, i.e., the Stipulation, entered into on January [], 2019 ('Effective Date')," to state, "These negotiations resulted in the agreement to settle all claims of the Class against the Defendants, i.e., the Stipulation, entered

1 into on February 1, 2019." Notice at 4.

2 Plaintiffs should define "Effective Date" in accordance with
3 the stipulation's definition in or following this sentence, "In
4 return for the payment of the Settlement Fund . . . upon the
5 Effective Date." Id.

6 Plaintiffs should revise this sentence, "The date of [sic]
7 covering a 'short sale' is deemed to be the date of purchase of
8 Thoratec common stock . . ." to state, "The date of purchase
9 covering a 'short sale' is deemed to be the date of purchase of
10 Thoratec common stock" Notice at 7.

11 Plaintiffs should omit this clause, "(1) whether a Class
12 should be certified for purposes of the Settlement and whether
13 Class Representative and Class Counsel have adequately
14 represented the Class" Notice at 8. Plaintiffs should
15 renumber the remaining clauses in the revised sentence in
16 numerical order starting with "(1)." See id.

17 If Cooper is a class representative, Plaintiffs should
18 revise this sentence, "Todd Labak was appointed by the Court to
19 represent the Class as Class Representative," to state, "Bradley
20 Cooper and Todd Labak were appointed by the Court to represent
21 the Class as Class Representatives." Notice at 3.

22 If Cooper is not a class representative or is a class
23 representative but Plaintiffs do not intend to seek Court
24 approval of an incentive award for Cooper, Plaintiffs should
25 revise this sentence, "In addition, a Compensatory Award for the
26 time and expenses incurred by Lead Plaintiffs will be sought, not
27 to exceed \$10,000 each," to state, "In addition, a Compensatory
28 Award for the time and expenses incurred by Lead Plaintiff Todd

1 Labak will be sought, not to exceed \$10,000." Notice at 2.
2 Plaintiffs should revise these sentences, "In addition, Class
3 Counsel intend to apply to the Court on behalf of the Court-
4 appointed Class Representatives Plaintiffs [sic] for
5 reimbursement from the Settlement Fund of their reasonable time,
6 costs and expenses directly relating to their representation of
7 the Class. Class Counsel will seek no more than \$10,000 for each
8 Class Representative," to state, "In addition, Class Counsel
9 intend to apply to the Court on behalf of the Court-appointed
10 Class Representative Plaintiff Todd Labak for reimbursement from
11 the Settlement Fund of his reasonable time, costs and expenses
12 directly relating to his representation of the Class. Class
13 Counsel will seek no more than \$10,000 as reimbursement for
14 Labak." Notice at 8. Plaintiffs should revise this clause,
15 "and/or the application for the reimbursement of the reasonable
16 costs and expenses of the Class Representatives . . ." to state,
17 "and/or the application for the reimbursement of the reasonable
18 costs and expenses of Class Representative Todd Labak." Notice
19 at 9.

20 If Cooper is a class representative and Plaintiffs intend to
21 seek Court approval of an incentive award for Cooper, Plaintiffs
22 should revise this clause, "whether the Class Representative's
23 application for reimbursement of costs and expenses should be
24 granted," to state, "whether the Class Representatives'
25 application for reimbursement of costs and expenses should be
26 granted." Notice at 8.

27 C. Summary Notice

28 Plaintiffs should revise this sentence, "YOU ARE HEREBY

1 NOTIFIED . . . 1301 Clay Street, Oakland, CA, . . ." to state,
2 "YOU ARE HEREBY NOTIFIED . . . 1301 Clay Street, Oakland, CA
3 94612, . . ." Summary Notice at 1, Docket No. 122-4.

4 Plaintiffs should revise this sentence, "If you purchased or
5 acquired Thoratec Corporation common stock between May 11, 2011
6 and November 4, 2014, your rights may be affected by the
7 Settlement of this Action," to state, "If you purchased or
8 acquired Thoratec Corporation common stock between May 11, 2011
9 and August 6, 2014, your rights may be affected by the Settlement
10 of this Action." Id.

11 Plaintiffs should revise this clause, "email:
12 www.thorateclitigation.com" to include either an email address or
13 other instructions on how to electronically communicate with the
14 settlement administrator. Id.

15 Plaintiffs should include that the full-length notice, proof
16 of claim and release form and other settlement documents are
17 available through PACER and the settlement administrator's
18 website. Id.

19 If Cooper is not a class representative or is a class
20 representative but Plaintiffs do not intend to seek Court
21 approval of an incentive award for Cooper, Plaintiffs should
22 revise this clause, "whether the Class Representative's
23 application for reimbursement of costs and expenses should be
24 granted . . ." to state, "whether Class Representative Todd
25 Labak's application for reimbursement of costs and expenses
26 should be granted . . ." Id.

27 If Cooper is a class representative and Plaintiffs intend to
28 seek Court approval of an incentive award for Cooper, Plaintiffs

1 should revise this clause, "whether the Class Representative's
2 application for reimbursement of costs and expenses should be
3 granted . . ." to state, "whether the Class Representatives'
4 applications for reimbursement of costs and expenses should be
5 granted" Id.

6 D. Proof of Claim and Release Form

7 Plaintiffs should include in Section "A. General
8 Instructions & Information" the settlement administrator's
9 telephone number and email address or explain how one can
10 otherwise electronically communicate with the settlement
11 administrator. Proof of Claim and Release Form at 1, Docket No.
12 122-5.

13 Plaintiffs should revise this sentence, "You are urged to
14 read carefully the accompanying Notice of Proposed Settlement of
15 Class Action, Motion for Attorneys' Fees and Expenses, and Final
16 Approval Hearing (the 'Notice')," to state, "You are urged to
17 read carefully the accompanying Notice of Proposed Settlement of
18 Class Action (the 'Notice')." Id.

19 Plaintiffs should revise these clauses, "you may email the
20 Settlement Administrator's electronic filing department at
21 www.Thoratectherapeuticslitigation.com . . ." and "you should
22 contact the electronic filing department at
23 www.Thorateclitigation.com . . ." by omitting the references to
24 these websites and including instead email addresses or
25 instructions on how one can otherwise electronically communicate
26 with the filing department. Id. at 2.

27 Plaintiffs should revise this sentence, "The date of [sic]
28 covering a 'short sale' . . ." to state, "The date of purchase

1 covering a 'short sale'" Id. at 2.

2 Plaintiffs should revise this phrase, "Northern District of
3 Illinois," to state, "Northern District of California." Id. at
4 5.

5 Plaintiffs should include the settlement administrator's
6 telephone number and email address or instructions on how one can
7 otherwise electronically communicate with the settlement
8 administrator following the sentence, "If you have any questions
9 or concerns regarding your claim, please contact the Settlement
10 Administrator." Id. at 7.

11 E. Proposed Order Preliminarily Approving Settlement

12 Plaintiffs should revise the date in the first sentence from
13 "January 30, 2019" to "February 1, 2019." Proposed Order at 1,
14 Docket No. 122-3.

15 Plaintiffs should revise this clause, "and served upon Class
16 Counsel no later than fourteen (14) days prior to the date
17 scheduled herein for the Final Approval Hearing," to state, "no
18 later than fourteen (14) days prior to the date scheduled herein
19 for the Final Approval Hearing." Id. at 5.

20 Plaintiffs should omit this sentence, "Copies of the
21 objections and supporting documents for Class Counsel shall be
22 served upon Leigh Handelman Smollar, Esq." Id.

23 Plaintiffs should state that any amount less than \$20 is
24 presumptively too costly to distribute to any class member, but
25 //

1 that Plaintiffs will seek Court approval before distributing any
2 remaining settlement funds to the cy pres recipient in any event.

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4 IT IS SO ORDERED.

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6 Dated: March 7, 2019

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CLAUDIA WILKEN
United States District Judge